IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.M.JAMES

TUESDAY, THE 20TH MARCH 2007 / 29TH PHALGUNA 1928

CRL.A.No. 1771 of 2003()

AGAINST THE ORDER IN CRLP.199/2003 Dated 14/08/2003
CC.146/1999 of JUDL.MAGISTRATE OF FIRST CLASS-I, ERNAKULAM

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APPELLANT: COMPLAINANT

HAJIRA BEGUM, W/O. M.A.YOOSEF, MALIKKAL HOUSE, C.C.14/715, PANDIKUDY, KOCHI-2

BY ADV. SRI.T.H.ABDUL AZEEZ

RESPONDENTS: ACCUSED AND STATE

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1. BINO THOMAS, MANAGING DIRECTOR, COCHIN PEST CONTROL, 40/634, 1ST FLOOR, SHALIMAR CHAMBERS, CONVENT ROAD, KOCHI-35, ERNAKULAM.

2. STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM KOCHI-31

BY ADV. SRI.ALEXANDER PETER
PUBLIC PROSECUTOR, SRI THOMAS JOHN AMBOOKEN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 20/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.M.JAMES, J.

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Crl.A. No. 1771 of 2003 (D)

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Dated this the 20th day of March, 2007

J U D G M E N T

On the death of the original complainant, his widow, Hajira Beegum, was impleaded before the court below. The complaint was preferred against the first respondent, the accused, under Section 138 of the Negotiable Instruments Act, in short 'the Act'. To prove the case, the complainant had examined herself as PW.1 and marked five documents. The first respondent had marked two documents, Exhibit D1 and D2. The court below, Judicial Magistrate of the First Class Court-I, Ernakulam, in C.C.No.146/1999, accepted the principle laid down in **Sreenivasan vs.State of Kerala** [1999 (3) KLT 849] and acquitted the accused. Hence, this appeal challenging the order of acquittal, after obtaining leave.

2. The brief facts of the case are that the husband of the appellant, issued a cheque for rupees two lakhs in the name of one C.M.John, on the latter agreeing to arrange an

admission for M.B.B.S, at Bangalore Medical College, to the grandson of the appellant. In the absence of the said C.M.John, the first respondent accused received the said cheque, and as a security, he in turn, issued Exhibit P1 cheque to the husband of the appellant. Exhibit D2 agreement was entered into between the husband of the appellant as well as the first respondent-accused. In it, the parties have made clear that another agreement would be entered into between C.M.John and the husband of the appellant. The cheque of the accused would be returned to him, after the arrangements materialise. It is complained of that, though Exhibit D1 agreement between C.M.John and the husband of the appellant had been executed, Exhibit P1 cheque had not been returned. The facts further reveal that the promised admission, to M.B.B.S course, to the grandson of the appellant, was also not arranged. The learned counsel for the first respondent submits that C.M.John is absconding and Exhibit P1 cheque issued by him was only as a security. He had not received any consideration. Therefore, he

is not liable. Hence, the counsel urges to sustain the lower court judgment.

3. The learned counsel for the appellant relying on **I.C.D.S. Ltd. vs.Beena Shabeer** [2002 (3) KLT 218 (SC)], argued that Sreenivasan's case cited supra is no more a good law and it has been overruled. Therefore, even a person who issued a cheque as a guarantor or for security, is liable to be proceeded, under Section 138 of the Act. Hence, prayed that the judgment of the lower court may be set aside.

4. I have gone through the facts of the case. I have also gone through the legal principles laid down by the Apex Court. I respectfully agree with those propositions, Exhibit P1 cheque was issued by the first respondent-accused-to the husband of the appellant, as a security, in return to the cheque that was issued by the latter for an amount of rupees two lakhs to C.M.John. The first respondent-accused was an agent of C.M.John. Despite the execution of Exhibit D1, between C.M.John and the husband of the appellant, the first respondent-accused-is liable to be proceeded against, under Section 138 of

the Act. Therefore, in accordance with the principles in Beena Shabeer's case, cited above, the dismissal of the complaint is unsustainable.

5. A Division Bench of this Court had held in **Lillykutty vs. Lawrance** [2003 (3) KLT 721] that a person who is holding a cheque in due course can proceed against the drawer of the cheque, unless the latter rebuts the presumption available under Sections 118 and 139 of the Act, as per the principles of preponderance of probabilities and, in such circumstances, the court has to presume that the cheque had been issued after receipt of the consideration. In the case at hand, the cheque for rupees two lakhs was received by the first respondent from the husband of the appellant. He issued Exhibit P1 cheque, as a security for the amount contained in the cheque, rupees two lakhs, issued to C.M.John, the uncle of the first respondent. Although Exhibit D1 agreement was entered into between C.M.John and the late husband of the appellant, Exhibit P1 cheque continued to be in the possession of the late husband of the appellant. Therefore, it cannot be said that Exhibit D1

agreement has given any opportunity, or took away the responsibility and liability of the first respondent-accused from discharging the liability contained in Exhibit P1 cheque. I do not find any evidence adduced, except producing Exhibits D1 and D2 documents. When I appreciate the entire materials produced before me and the evidence available on record, I find that the lower court has gone wrong in dismissing the complaint.

6. The next question is, in the light of the evidence available, whether the first respondent could be convicted. At this stage the learned counsel for the first respondent-accused submits that a criminal case has been registered against the first respondent as well as his uncle C.M.John. The first respondent has been convicted, as the said C.M.John is absconding. It is also further submitted that an appeal filed by the first respondent is pending, before the Fast Track Court-II, Ernakulam, for judgment. In such circumstances, the counsel further prays that an opportunity may be given to the first respondent-accused either to settle the matter or to allow him to adduce further evidence.

7. In the above circumstances, I set aside the impugned judgment dated 11/09/2002 and restore C.C.No.146/1999. The case is remitted to the Judicial Magistrate of the First Class Court-I, Ernakulam.

8. The parties shall appear before the court below on 26/04/2007.

9. The case being of the year 1999, I direct the learned Magistrate to dispose of the same, within three months from the date of appearance of the parties before the court below, as per the law.

The appeal is accordingly allowed.

(J.M.JAMES)
Judge

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